In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

No. 223

DELTA AIR LINES, INC., PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE POSTMASTER GENERAL AND THE UNITED STATES OF AMERICA

These petitions present the question whether Section 406 (b) of the Civil Aeronautics Act of

1938, 52 Stat. 998, 49 U.S.C. 486, requires the Civil Aeronautics Board, in fixing past subsidy mail pay for the international division of an air carrier, to offset the carrier's excess subsidy earnings from its domestic operations.[1] The Board previously had fixed a final prospective domestic subsidy rate which it estimated would give the carrier a 7.4 percent return on its investment allocable to domestic flights. Actual operating results, however, produced a 12.51 percent return on domestic operations for the period in question, or $654,000 more than a 7.4 percent would have given. In subsequently fixing the carrier's subsidy for its international operations for the same period, the Board refused to offset the $654,000—which it characterized as "excess earnings". (R. 21, 53.) The Board held that Section 406 (b) did not require it to reduce a carrier's subsidy need "with any part" of its other revenue if there were "sound reasons for not doing so as a matter of economic policy" (R. 54).

On the Postmaster General's petition to review, the court of appeals set aside the Board's order. The court, Judge Prettyman dissenting, held that the Board's failure to offset the excess earnings violated the "plain meaning" of the Act (R. 71).

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[1] Section 406(b) directs the Board, in determining a carrier's subsidy need, to "take into consideration * * * the *need of each such air carrier* for compensation * * * sufficient * * * together with *all other revenue of the air carrier*, to enable *such air carrier* * * * to maintain and continue the development * * *" of a national air transportation system [emphasis added].

The court stated that the need to be met in awarding subsidy was that of the "carrier as a whole," and not that of "divisible units conducting separate operations" (*ibid.*); that the total subsidy cannot exceed such overall need (*ibid.*); and that by failing to "take" the excess earnings "into consideration" the Board had allowed the carrier $654,000 more than its actual need "in disregard of the statutory requirement to keep subsidy allowances within those bounds" (R. 72).

We think that the decision below was correct. However, in view of the importance of the question in the administration of the Act, we do not oppose the petition.[2] In so doing, however, we do not acquiesce in any of petitioners' contentions. Specifically, we do not concur in the conjectural allegation (Pet. No. 222, 14-16; No. 223, 8-10) that the decision below might result in a number of domestic carriers withdrawing from international operations. Moreover, both petitions treat the Board proceeding as if it involved traditional rate-making, rather than the fixing of a Government subsidy. Thus, petitioners argue (Pet. No. 222, 9-10, 16; No. 223, 11, 14-15) that the decision below curtails the normal authority of rate-making bodies to classify different operating divisions as separate rate-making units. However, this power to classify

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[2] We wish to point, however, that pursuant to Reorganization Plan No. 10 of 1953, 18 Fed. Reg. 4543, subsidy payments for services rendered after October 1, 1953, will be made by the Board, and not by the Postmaster General. Thereafter, the Postmaster General will make only payments covering compensation for the carriage of mail.

relates to the fixing of rates which a regulated business can charge its customers; it does not authorize separate subsidies for a carrier's different divisions without consideration of over-all need. These and other considerations which, in our view, support the decision below, will be fully developed in our brief on the merits if the petitions are granted.[3]

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

AUGUST, 1953.

[3] We also disagree with petitioner's contention in No. 223 (Pet. 12-14) that the decision below conflicts with *Transcontinental & Western Air, Inc.* v. *Civil Aeronautics Board*, 336 U.S. 601.

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